

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 20 September 2006**

**BALCA Case No.: 2005-INA-149**  
ETA Case No.: P2004-HI-09579163/IW

*In the Matter of:*

**HAWAIIAN GOURMET COFFEE ROASTERS, INC.,**  
*Employer*

*on behalf of*

**MIKAELA SILLMAN,**  
*Alien.*

Certifying Officer: Martin Rios  
San Francisco

Appearances: Andrew Shackelford, Esquire  
American Services Network  
*For the Employer and the Alien*

Before: **Burke, Chapman and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").<sup>1</sup> We base our decision on the record upon which the CO denied

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<sup>1</sup> This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

### **STATEMENT OF THE CASE**

On August 14, 2002, the Employer, Hawaiian Gourmet Coffee Roasters --a coffee roasting wholesale and retail sales company -- filed an application for alien employment certification on behalf of the Alien, Mikaela Sillman, to fill the position of Operations Manager. (AF 112-113). The job to be performed was described as follows:

In charge of running the business. Hiring, training scheduling and supervising the employees. Develop and enforce the employee manual and procedures. Inventory management, ordering, pricing, developing the product line, dealing with the vendors. All marketing activities. In charge of quality control and maintenance, customer service, baking and food preparation. Also provide profit and expense reports. In charge of store display, mail and internet orders, and accounts for contract roasting.

Minimum requirements for the position were listed as a Bachelor's degree in Business and three years of retail experience.

The Employer received forty-three applicant referrals in response to its recruitment efforts, all of whom were rejected as unqualified for the position. (AF 222-232).

A Notice of Findings (NOF) was issued by the CO on October 4, 2004. (AF 204-207). The CO found two deficiencies with the application. First, the CO found that the application presented an unduly restrictive combination of duties: baking and food preparation as part of the job description for Operations Manager. The CO also cited the Employer's unlawful rejection of qualified U.S. workers for other than job-related reasons. The CO noted that many of the U.S. workers met the educational and three years of retail experience requirement, but were rejected for lack of experience in specific duties outlined in the job description on the ETA 750A.

In Rebuttal, the Employer justified the combination of duties as attributable to the small nature of the business and the limited time (5%) spent on the challenged duties. The Employer provided a detailed statement regarding the recruitment results relating to the forty-three applicants. The applicants were all rejected for either lack of a Bachelor's Degree in business and/or lack of experience in the specific job duties cited in the job description. (AF 27-203).

A Final Determination denying labor certification was issued by the CO on November 22, 2004, based upon a finding that the Employer had failed to document lawful rejection of five of the U.S. worker applicants. (AF 24-26). In denying certification, the CO noted that the Employer had acknowledged that the applicants met the stated educational requirement and experience in retail ranging from three to ten years, but then found that the applicants were not qualified because they lacked specific experience in one or more of the job duties shown on the ETA 750A.

The Employer filed a Request for Administrative Review by letter dated December 22, 2004, and the matter was referred to this Office and docketed on May 2, 2005. (AF 1-23).

## **DISCUSSION**

Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity during the recruitment supporting a labor certification application, an employer must document that they were rejected solely for lawful job-related reasons. Pursuant to section 656.21(j)(1)(iv), an employer must explain, with specificity, the lawful, job-related reasons for not hiring each applicant interviewed.

The clear language of Form ETA 750, Part A, gives an employer the chance to state in detail the minimum education, training, and experience necessary to perform satisfactorily the job duties described. Pursuant to 20 C.F.R. § 656.21(b)(5), a U.S. worker cannot be considered unqualified for the job offer unless he/she fails to meet one or more of the requirements set forth by the employer on the ETA 750 Part A.

In the instant case, the Employer unlawfully rejected U.S. workers for lacking experience in unstated requirements. An employer must state all the requirements for the petitioned position on the Form ETA-750A application for alien labor certification, and if an applicant meets the requirements as stated by Employer, he or she is deemed qualified for the job. *See Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988)(*en banc*). In *Bell*, the Board held that the actual test was whether the applicant met the job requirements in the Form ETA-750A, item 14 (requirements). In general, labor certification is properly denied where an employer unlawfully rejects workers who meet stated minimum education and experience requirements. If employer seeks specific requirements, they should be specified in the application. *See Presbyterian Hospital*, 1988-INA-38 (Feb. 21, 1989)(*en banc*); *Just Clothes, Inc.*, 1988-INA-252 (Mar. 21, 1989)(*en banc*). Job requirements relating to education, skills, training or experience are so fundamental that they must be stated from the outset of the application process. *Jeffrey Sandler, M.D.*, 1989-INA-316(Feb. 11, 1981)(*en banc*).

The Employer's minimum requirements for the position, as clearly stated on the Form ETA 750A, included a Bachelor's degree in Business and three years experience in the related occupation of Retail. The Employer did not require experience in the job offered, despite the ETA 750A form's specific allotment of space for this requirement. The Employer only required experience in the related occupation of Retail. Hence, because the Employer did not require experience in the job to be performed, it cannot lawfully reject applicants for lacking that experience.

Because the cited applicants were rejected for lacking experience in job duties not specified as job requirements, the Employer's basis for rejection of those applicants was not a lawful, job-related reason as required under the regulations. On this basis, we conclude that the Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, determine that labor certification was properly denied.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.